



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, & Ouko SCJJ)

PETITION NO. E012 OF 2023

DARI LIMITED 1ST APPLICANT
RAPHAEL TUJU 2ND APPLICANT
MANO TUJU 3RD APPLICANT
ALMA TUJU 4TH APPLICANT
YMA TUJU 5TH APPLICANT
S.A.M COMPANY LIMITED 6TH APPLICANT

VERSUS

EAST AFRICAN DEVELOPMENT BANK RESPONDENT

*Being an application to strike out Respondent's Replying Affidavit, leave to
adduce additional evidence and opportunity to file rejoinder to the
Respondent's response*

Representation:

Paul Muite, SC and Mr. Nyamodi for the Applicants
(*V. A. Nyamodi & Co. Advocates*)

Prof Githu Muigai SC and Mr. Wakhisi for the Respondent
(*Mohammed Muigai LLP*)

RULING OF THE COURT

[1] UPON reading the Notice of Motion by the Petitioners dated 26th October 2023 and lodged on 27th October 2023, under provisions of Rules 3, 26, 32, 40(3) & 42(2) of the Supreme Court Rules, Sections 3A & 20 of the Supreme Court Act, Articles 50(1) & (2)(k), 159(2)(d) & (e) of the Constitution of Kenya seeking the following orders:

- “1. This application be certified as urgent and same be heard on priority basis.*
- 2. This Honourable Court be pleased to strike out the Respondent’s Replying Affidavit sworn by Justa Kiragu and dated 12th May, 2023*
- 3. In the alternative, this Honourable Court do grant leave to the Petitioner to adduce additional evidence in terms of the Affidavits of Raphael Tuju, Edward Okundi and Amos Aketch dated 26th October, 2023 annexed to this application. The said affidavits be deemed to have been filed and served.*
- 4. The affidavits of Raphael Tuju, Edward Okundi and Amos Aketch dated 26th October, 2023 annexed to this application be admitted to the record in this petition of appeal as a rejoinder to the affidavit dated 12th May 2023 by Justa Kiragu on behalf of the Respondent.*
- 5. In further alternative, this Honourable Court do grant the Petitioners the opportunity they are entitled to in law, to file a rejoinder to the Respondent’s response.*
- 6. This Honourable Court do issue any order it deems necessary so as to meet the ends of justice.*
- 7. Costs of this Application be provided for.”*

[2] UPON considering the grounds in support of the application and the averments contained in the supporting affidavit sworn by **Raphael Tuju** the 2nd Petitioner on 26th October, 2023 where he contends that in response to the petition of appeal filed herein, the respondent filed a replying affidavit sworn by Justa Kiragu on 12th May, 2023 which did not respond to the petition of appeal as envisaged by Rule 42 of the Supreme Court Rules but instead, relying on the

documents in the record of appeal proceeded to give a slanted narrative of the history of the engagements between the parties to the petition of appeal. In the alternative, if the Court is not minded to strike out the response, then to affirm the constitutional right to fair hearing, leave should be granted to the petitioners to adduce additional evidence, in terms of the affidavits of Raphael Tuju, Edward Okundi and Amos Aketch annexed to the application which is necessary for reasons stated on the face of the application; and

[3] UPON considering further arguments that it is prejudicial to the petitioners to proceed to the hearing of the petition of appeal without the additional evidence contained in the said affidavits of Raphael Tuju, Edward Okundi and Amos Aketch; the Honourable Court in its Ruling delivered on 6th October 2023 struck out the petitioners' supplementary affidavits filed in rejoinder to the respondent's response on the premise that the said affidavits adduced additional evidence without following the due process; the striking out of the supplementary affidavits leaves false and inaccurate averments by the respondent as contained in its response uncontroverted and unchallenged by the petitioners; and that the petitioners are entitled under Rule 42 of the Supreme Court Rules and Article 50 of the Constitution to file a rejoinder to the respondent's response and presently, there is no rejoinder to the respondent's response by the petitioner on record; and

[4] UPON considering the written submissions dated 26th October 2023 in support of the application in which the applicants raise three issues they deem apposite for the determination of the appeal. On the first issue, whether the replying affidavit by Justa Kiragu should be struck out, the petitioners rely on their above submission that the affidavit gives a misleading background and did not respond to the appeal as envisaged by Rule 42 of the Supreme Court Rules. They add that failure to strike out the response would unfairly discriminate against the petitioners, contrary to Article 27(1) and (2) of the Constitution.

[5] On whether the petitioners should be granted leave to adduce additional evidence in exercise of their right to a rejoinder, the petitioners seek as an alternative remedy to be granted the leave sought. They refer to paragraph 26

of the Court's ruling taking judicial notice of the supplementary affidavits being filed in rejoinder to the respondent's response and refer to paragraphs 13 to 30 of the supporting affidavit by Raphael Tuju to demonstrate how each and every document annexed to the affidavits they intend to file as a rejoinder. They add that no prejudice will be suffered by the respondent bearing in mind provisions of Rule 26(4) of the Supreme Court Rules. They also rely on ***Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*** SC Petition 18 & 20 of 2014 [2014] eKLR on the court's jurisdiction when determining whether it should admit new evidence and ***Kanyuira v Kenya Airports Authority (Petition 7 of 2017) [2021] KESC 7 (KLR) (Civ) (8 October 2021) (Ruling)*** to even out the playing field between the parties to the suit.

[6] They submit that they satisfy the limbs under section 20 of the Supreme Court Act. The petitioners conclude that the petitioners should be granted the opportunity to file a rejoinder to the respondent's replying affidavit to avert the determination of the appeal on the basis of slanted factual terrain. Their argument is that the rejoinders filed on 12th June 2023 were struck out for not being filed procedurally. The purpose of the striking out was therefore to ensure compliance with procedural rules and not intended to be punitive; and

[7] **TAKING INTO ACCOUNT** the respondent's replying affidavit sworn on 28th October 2023 by **Justa Kiragu**, the respondent's Principal Investment Officer based in the respondent's country office in Kenya in response and opposition to the petitioners' Notice of Motion application. She responds to the three issues raised by the petitioners and avers that the application is misplaced, untenable and ought not to be allowed as prayed. On whether the replying affidavit should be struck out, she responds that the application seeks to prematurely address the merits of the respondent's response and defence outside of the scope of the petition proceedings; that Rule 42(1) does not prescribe the form and content of a response to a petition, the respondent having opted to use the replying affidavit. She maintains that the affidavit is strictly limited to addressing the documents filed by the petitioners, the petitioners having failed to point out the inaccurate, false and uncontroverted

evidence which raises evidentiary issues not pleaded in the petition of appeal. She urges the Court to exercise restraint and discretion to maintain the replying affidavit on record.

[8] On the prayer for leave by the petitioners to adduce additional evidence, the deponent avers that this prayer cannot be an alternative prayer to that for striking out as leave to adduce evidence is expressly provided under Rule 26 of the Supreme Court Rules. She adds that the petitioners do not meet the threshold for additional evidence as set out in ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others*** SC Petition 7 & 9 of 2018 (consolidated) [2018] eKLR and have not sought to extend time within which to file the affidavits, time prescribed under Rules 42(2) and (3) having lapsed. She further opposed the adducing of the affidavits in evidence on several grounds including that the averments deposed by the 2nd petitioner, Amos Oketch and Edward Okundi are premised on information and documents that did not form part of the record of the High Court of Kenya; that this court lacks jurisdiction to consider and interrogate them; some of the averments raise fresh matters beyond this Court's jurisdiction, unsupported by documentary evidence, are scandalous, frivolous and vexatious; some averments are res judicata and that some of them are already on record.

[9] In objection to the 2nd Petitioner's affidavit in rejoinder and annexures thereto, Justa Kiragu avers that the same is premised on information and documents that this Honourable Court lacks jurisdiction to consider and/or interrogate as more particularly indicated in paragraph 18 of the affidavit. This ranges from raising issues in the exclusive jurisdiction of the High Court of Justice Business and Property Courts of England and Wales, Queen's Bench Division, Commercial Court which jurisdiction the petitioners voluntarily submitted themselves before; the issues do not concern interpretation of the constitution therefore beyond the scope of section 15A of the Supreme Court Act; the application for recusal of the English High Court Judge was unsuccessfully made by the petitioners and they did not appeal against the ruling; private commercial documents between the petitioners and third

parties; that the dispute between the parties was the default by the petitioners of obligations under the Facility Agreement; and

[10] UPON further consideration of the respondent's objection to the affidavit sworn by Amos Oketch together with the annexures thereon to be admitted into evidence on grounds that it is premised on privileged documents, the said Amos having been employed at the respondent from 2nd January 2011 to September 2017; that in the course of employment he executed Oaths of Service and Secrecy Agreements restricting him from disseminating documents or materials of the respondent without lawful authority; that the deponent was terminated on grounds of gross misconduct rendering the documents annexed to his affidavit inadmissible under Article 50(4) of the Constitution of Kenya, Article 46 of the Further Treaty Amending and Re-enacting the Charter of the Respondent, Order 3(b) of the Privileges and Immunities Cap.179 Laws of Kenya and Article 24 of the First Schedule of the Privileges and Immunities Cap.179 Laws of Kenya; and

[11] Having therefore considered the application, supporting affidavit, affidavit in rejoinder and submissions before us by the petitioners on one hand and the replying affidavit on behalf of the respondent on the other hand, **WE NOW OPINE** as follows:

- i. By the ruling made on 6th October 2023, we struck out the supplementary affidavits by the petitioners for want of procedure. We observed that the applicants did not invoke Rule 26 in seeking to adduce additional evidence despite acknowledging that the supplementary affidavits sought to rebut averments made by the respondent. It is apparent that in filing the present application, the petitioners seek to re-introduce the contents of the said affidavits that were otherwise struck out. This in our view is akin to ingeniously seeking to discreetly review our ruling. The parties appear to be rehashing their arguments made in the application leading to the above ruling.
- ii. The main prayer before the Court is for the striking out of the Replying Affidavit sworn by Justa Kiragu on 12th May 2023. In the alternative,

the petitioners have sought leave to adduce additional evidence by way of affidavits by Raphael Tuju, Edward Okundi and Amos Oketch with the affidavits to be deemed as filed and part of the record in the petition of appeal. In the further alternative, the petitioners pray for an opportunity to file a rejoinder.

- iii. Rule 42 of the Supreme Court Rules provides for response to petition of appeal in the following manner:

“42. (1) Unless otherwise directed by the Court, a respondent shall file grounds of objection, an affidavit, or both, within fourteen days of service of the petition.”

The tenor of the above provision is that the respondent was at liberty to choose whether to file grounds of objection and/or affidavit. In this instance, the respondent opted to file the affidavit sworn by Justina Kiragu. This rule does not specify the form or content of the said response to petition. The petitioners having filed their petition and record of appeal, it is not upon them to dictate the manner in which a respondent should file its response. The petitioners are at liberty to attack the contents of the response during the hearing of the petition, within the petition itself and not through an application such as the one before us. As such we find the prayer to strike out the replying affidavit to be premature and unmerited.

- iv. As we noted in the ruling of 6th October 2023, the applicants hinge their appeal on the question of recognition and enforcement of foreign judgments in Kenya in relation to Articles 50 and 25 of the Constitution. Having declined to strike out the replying affidavit, does the alternative prayer for additional evidence avail? The petitioners submit that our order for striking out their affidavits was to enable them comply with the process. The petitioners have, however, sought the introduction of additional evidence as an alternative prayer.
- v. Taking the application in its context, the petitioners have not explained or justified their failure to adhere to the provisions of Rule 26 of the

Supreme Court at the first instance. Their attempt to seek leave to adduce additional evidence reeks of a belated afterthought with the objective of filling up gaps in its case. It is apparent that our ruling triggered the reaction by the petitioners. We therefore do not find merit in this prayer. With this finding, we do not find it necessary to interrogate the nature and threshold of the evidence sought to be adduced as clearly, the applicants are litigating/pleading in instalments. In the same vein, the prayer to deem the affidavits sworn by the 2nd petitioner, Edward Okundi and Amos Oketch as duly filed is rendered superfluous.

- vi. On the further alternative prayer for opportunity to file a rejoinder to the respondent's response, Rule 42(2) mandates the petitioner to file and serve a rejoinder within seven days of being served with the response. We understand that the Honourable Deputy Registrar issued directions on the filing of rejoinder which directions the petitioners did not heed. The petitioners have neither sought to extend time within which to file the rejoinder nor explained the reasons for non-compliance. We are not persuaded that the supplementary affidavits struck out in our ruling of 6th October 2023 were intended to be the rejoinder. Those affidavits were filed specifically in response to the replying affidavit in respect of the application for conservatory orders and to strike out supplementary affidavits. At no point was the Court dealing with the substantive petition. This points to the inexorable conclusion that the prayer to file a rejoinder is disallowed.
- vii. It is prudent that the matter proceeds to hearing during which the parties shall advance their respective cases for determination by the Court.
- viii. On costs, it is a settled principle that they follow the event. However, since the substantive dispute is still pending, it is only proper that the costs abide the outcome of the appeal.

[37] Consequently, and for the reasons aforesaid we make the following orders:

- (i) *The Notice of Motion Application dated 26th October 2023 and filed on 27th October, 2023 be and is hereby dismissed.*
- (ii) *Costs of the application shall abide the outcome of the appeal.*

It is so ordered.

DATED and DELIVERED at NAIROBI this 7th day of November, 2023.

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P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

**I certify that this is a
a true copy of the original**

REGISTRAR
SUPREME COURT OF KENYA